



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 1, 2007

Mr. Scott A. Durfee  
General Counsel  
Office of the District Attorney  
Harris County  
1201 Franklin Street, Suite 600  
Houston, Texas 77002

OR2007-01308

Dear Mr. Durfee:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 269402.

The Harris County District Attorney's Office (the "district attorney") received a request for all information maintained by the district attorney other than "work product and other matters that are confidential by law" regarding a specified cause number. We understand you to contend that all or part of the submitted information is not responsive to the request. In the alternative, you claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your contention that the submitted information is excepted under section 552.108 of the Government Code because it constitutes work product and is, thus, not responsive to the present request. Section 552.108 provides in pertinent part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(4) is applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380.

You assert that the present request is for the district attorney's entire litigation file. However, as you note, the requestor has specifically excluded "work product and other matters that are confidential by law" from the scope of the request. Thus, we find that present request is not a request for the district attorney's entire litigation file, and *Curry* is not applicable. However, you state that the documents submitted as Appendix B-1 were prepared by a prosecutor in anticipation of litigation or in the course of preparing for litigation and that these documents "reflect the mental impressions and legal reasoning of the attorney representing the state and his staff." Upon review, we agree that the documents in Appendix B-1 constitute the district attorney's work product under section 552.108(a)(4). Therefore, Appendix B-1 is not responsive to the present request.

You also contend that the submitted information is confidential in its entirety pursuant to common law privacy. Common law privacy protects information if 1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and 2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric information of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In Open Records Decision No. 393 (1983), this office concluded that although generally only information that

either identifies or tends to identify a victim of a sexual assault or other sex-related offense is confidential under common-law privacy, the governmental body was required to withhold the entire police report because the identifying information was inextricably intertwined with other releasable information. *See id.* at 2 (1983); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information that was not a matter of legitimate public interest); Open Records Decision Nos. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld), 339 (1982) (information that would identify victim of aggravated sexual abuse must be withheld). You assert that the entirety of the submitted information is confidential under common-law privacy because the requestor could easily determine the identity of a sexual assault victim. However, you have not established that the requestor knows the identity of the sexual assault victim. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 58 (Tex. 1992) (sexual assault victim's true identity became part of public record because used in indictment, motion in limine, and jury charge and therefore must be released as information was obtained from public record). Furthermore, the identity of the victim is not inextricably intertwined with other releasable information. We have marked the information that is confidential under common-law privacy.

Some of the submitted information constitutes medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be

released. *See* Occ. Code §§ 159.004, .005. §§ 159.005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). The documents submitted in Appendix B-3 consist of confidential medical records.

The submitted information includes criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 8, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov’t Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. We have marked the portions of the submitted information that consist of confidential CHRI.

Article 42.12 of the Code of Criminal Procedure is applicable to a presentence investigation report and provides in part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant. Medical and psychiatric records obtained by court order shall be kept separate from the defendant’s community supervision file and may be released only by order of the judge.

Crim. Proc. Code art. 42.12 § 9(j). The information submitted at Appendix B-4 consists of a pre-sentence investigation report that is made confidential by article 42.12.

The submitted information includes Texas motor vehicle record information. Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a

Texas agency is confidential. Gov't Code § 552.130(a)(1), (2). We have marked the information made confidential by section 552.130.

The submitted information also includes social security numbers. Section 552.147 of the Government Code provides that social security numbers are confidential information. *Id.* § 552.147(a). We have marked the confidential social security numbers.

In summary, we have marked the portions of the submitted information that consist of attorney work product or are made confidential by law. Such information is not responsive to the present request and need not be released to the requestor. The remaining information must be released.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/eb

Ref: ID# 269402

Enc. Submitted documents

c: Mr. Alan J. Baer  
Stradley, Chernoff & Alford, L.L.P.  
1018 Preston, Suite 200  
Houston, Texas 77002  
(w/o enclosures)